Supreme Court, U.S.
FILED

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No. -

In The

Supreme Court of the United States

October Term, 1995

JOHN J. NICIT,

Petitioner,

vs.

ANNA MARIE NICIT,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York/Supreme Court Appellate Division Fourth Department

PETITION FOR WRIT OF CERTIORARI

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(21248)

40 pp

QUESTIONS PRESENTED

I

Did the New York Courts commit constitutional error in giving full faith and credit to wife's ex parte Alabama divorce judgment where no proof of her domicile in that State was submitted to the Divorce Court?

II

Even assuming the validity of that Judgment to dissolve the marriage, per se, is the New York Statute [DRL 236B]* unconstitutional in permitting the judgment to be directly used to affect husband's property rights since the Alabama Court did not have personal jurisdiction over him?

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*"2. Matrimonial actions. * * * the provisions of this part shall be applicable * * * to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce, * * *."

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FACTS AND PROCEDURAL HISTORY

Parties resided in New York. Wife left husband in 1986 and sued for divorce in New York on the ground of cruelty. It was dismissed at the close of her proof with a finding of abandonment. She sued again on the same grounds in a different County in 1990, and was dismissed on summary judgment. She then procured an ex parte Alabama divorce in 1993 and brought the instant proceeding in 1994 for "Equitable Distribution" of marital assets pursuant to New York's Domestic Relations Law §236B(2) which permits same "following a foreign judgment of divorce."

Husband moved for summary judgment on the constitutional points raised herein. The denial of the motion by the Trial Court on 7/11/94 [Appx. 18] was unanimously affirmed by the intermediate Appellate Court — the Appellate Division — on 12/23/94 [Appx. 21, 210 App. Div. 2nd 987].* The only way to get to the Court of Appeals at that stage was by leave of the Appellate Division. The motion therefor was denied February 3, 1995.

While those appellate proceedings were going on, the trial judge nevertheless proceeded with trial on the merits which eventuated in a judgment entered 12/12/94 awarding wife well over half husband's assets [Appx. 24]. Unanimously affirmed by the Appellate Division on 7/14/95. [Appx. 26 not yet reported].

An appeal as of right was then taken to the Court of Appeals because of the constitutional questions which were preserved from the motion for summary judgment.* However the Court on

---

* Not yet reported in NYS 2d.

* Civil Practice Law & Rules 5601(b): "An appeal may be taken to the Court of Appeals as of right: 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; - -." [Appx. 27]

11/2/95 sua sponte dismissed the appeal "upon the ground that no substantial constitutional question is directly involved." [Appx. 29]

The Findings and Judgment are voluminous in detailing property division. Hence only those portions relevant to this application are appended.

JURISDICTION OF THIS COURT

This Petition is submitted pursuant to 28 USC 1257(a) and Rule 10.

ARGUMENT

The above ground of the Court of Appeals' dismissal is mystifying since the final judgment was necessarily based upon the Alabama decree and the New York statute, both of which are subject to constitutional attack as developed below.

I

THE ALABAMA JUDGMENT IS JURISDICTIONALLY DEFECTIVE AND VOID BY REASON OF LACK OF PROOF IN THE JUDGMENT ROLL OF PREREQUISITE BONA FIDE RESIDENCE.

> "When the defendant is a non-resident, the other party to the marriage must have been a bona fide resident of this state for six months next before the filing of the Complaint, which must be alleged *and proved.*" [Alabama Statutes Title 30 *Marital & Domestic Relations* — "Divorce and Alimony" Sec. 30-2-5, emph. added].

Wife's *unverified* Complaint in Alabama alleges residence therein but no proof was submitted. The decree erroneously recites that it is based "upon the affidavit of plaintiff." The only affidavit filed was her attorney's which says nothing about resi-

dence. Plaintiff herself did not even sign any paper much less swear to anything in the action and the decree does not recite a finding of residence [Appx. 16]. Given all that, there can be no presumption of regularity. In accordance with *Williams v. N. C.* [325 U.S. 226, 65 S. Ct. 1092] the Alabama decisions hold such a judgment to be void [*Chavis v. Chavis,* 394 So. 54; *Martin v. Martin,* 173 Ala. 106, 55 So. 632]. Where a judgment is void at the forum, it is void everywhere, hence not entitled to full faith and credit [Kessel v. Triangle, 205 A.D. 51, 199 NYS 174, 1st Dept.].

The New York courts completely ignored that point and simply held the evidence submitted by wife *in this proceeding* sufficed to prove domicile. Thus:

> "The record [in the court below] supports the court's determination that petitioner had acquired a bona fide domicile in Alabama at the time the divorce action in that State was commenced." [Appx. 21]

This kind of expedient jurisprudence makes a shambles of constitutional as well as general legal principles. It is elementary that what is void, by definition, cannot be validated nunc pro tunc especially in a collateral proceeding.

II

THE N.Y. STATUTE OFFENDS DUE PROCESS IN PERMITTING THE EX PARTE DIVORCE JUDGMENT TO AFFECT HUSBAND'S PROPERTY RIGHTS SINCE THE DIVORCE COURT DID NOT ACQUIRE PERSONAL JURISDICTION OVER HIM.

It is elementary that where personal jurisdiction of a defendant was not obtained, a foreign judgment although effective to dissolve the marriage [if plaintiff was a bona fide resident]

> "was entitled to no effect at all so far as support or other property rights were concerned."

[*Vanderbilt v. Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360; *Accord: Estin v. Estin*, 334 U.S. 541, 68 S. Ct. 1213; *Lynn v. Lynn*, 302 N.Y. 193, 97 N.E.2d 748; *Bennett v. Bennett*, 103 A.D.2d 816, 478 N.Y.S.2d 47].

Although the Alabama decree itself does not purport to deal with such rights, yet it is automatically given that effect under DRL 236B which authorizes "proceedings to obtain maintenance or distribution of marital property following a foreign judgment of divorce"; the same as if it were a New York decree.

> "A cause of action for equitable distribution 'following a foreign judgment of divorce' *vests upon the entry of the foreign judgment.* [DRL 236(b)(5)(a)] *as it would upon entry of a divorce judgment in this State.*" [Emph. added]

[*Peterson v. Goldberg*, 180 A.D. 2d 260, 263, 2nd Dept., 585 N.Y.S.2d 439, where the issue was whether wife's death abated the pending equitable distribution proceeding. Held not. Court of Appeals denied leave to appeal 81 N.Y.2d 835, no NYS 2d citation].

Thus the N.Y. court acts as a mere conduit for channeling the legal force which emanates from the Alabama judgment. So that the effect is equally offensive to due process as in *Vanderbilt* and *Estin*.

Here again the issue was not dealt with below. Special Term's decision is completely silent [Appx. 18], while the Appellate Division's reads:

> "We reject respondent's contention that Petitioner is precluded from maintaining this proceeding on the ground that she obtained the foreign divorce judgment." [Appx. 21]

This misses the vital due process point of husband not having been subject to personal jurisdiction.

CONCLUSION

We think the case merits review under Rule 10 because the decision below conflicts with this Court's holdings and presents constitutional questions important to our federal system. The writ should be granted.

Dated: January 16, 1996

Respectfully Submitted,

JOHN J. NICIT, Pro Se
Attorney for Petitioner
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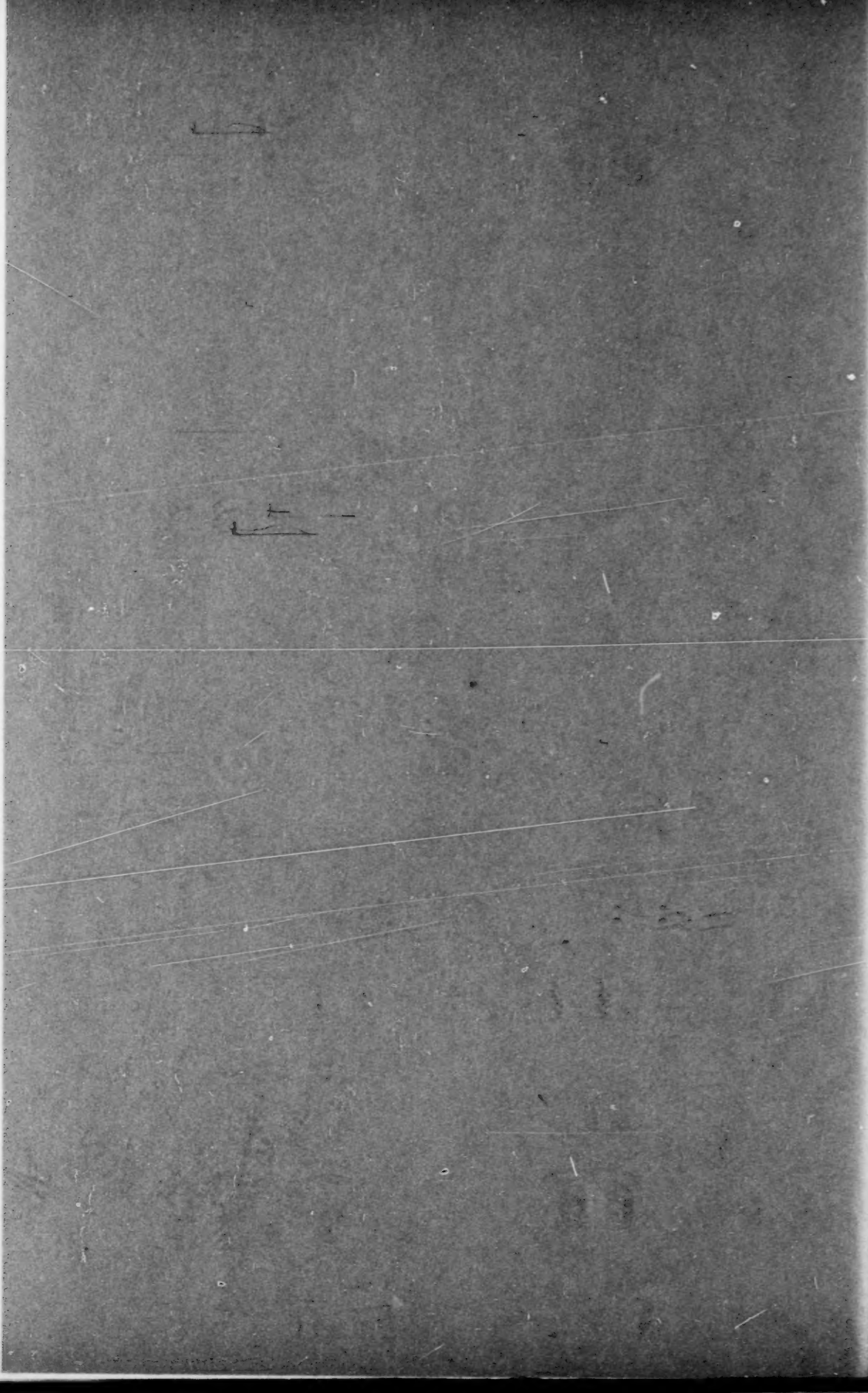
Waterloo, New York 13165
Telephone: (315) 539-9211

APPENDIX



PETITION FOR EQUITABLE DISTRIBUTION

SUPREME COURT
STATE OF NEW YORK COUNTY OF SENECA

ANNA MARIE NICIT, Petitioner, vs. JOHN J. NICIT, Respondent.	PETITION FOR EQUITABLE DISTRIBUTION Index No.

Petitioner alleges:

1. The parties herein were married on August 24, 1956, in the State of New York.

2. There are no minor children as issue of the marriage of the parties.

3. During the time that the parties were married and lived together, they resided at 4560 East Lake Road, Geneva, New York 14456.

4. On October 5, 1992, after a six-year separation from the respondent, petitioner relocated to Houston, Alabama.

5. On November 9, 1993, petitioner obtained a divorce from the respondent in the State of Alabama.

6. Respondent did not appear in the above action for divorce, either personally or by counsel, although respondent was personally served with a copy of petitioner's Summons and Complaint for divorce. See petitioner's Summons and Complaint, attached hereto as Exhibit "A" and "B," and Affidavit of Service attached hereto as Exhibit "B."

7. The issue of maintenance was previously addressed by a New York State Family Court order, which was in no way superseded by the Alabama decree, and which was specifically incorporated by reference into by the Alabama divorce decree; however, the divorce decree from the State of Alabama did not make any provision for equitable distribution of the marital property.

8. On or about January 6, 1994, an authenticated copy of the divorce judgment was filed with the County Clerk of Seneca County. A copy of that decree is attached hereto and made a part hereof as Exhibit "C."

9. Respondent was personally served with a copy of the decree. See Affidavit of service attached hereto as Exhibit "D."

10. During the years of their marriage, the parties acquired many items of property in a manner which would make them marital property under the laws of the State of New York.

11. Petitioner is entitled to equitable distribution of marital property and the disposition of separate property under the guidance of the Court.

12. Among the items to be distributed are the proceeds from the sale of the marital residence, which was purchased from joint funds and recently sold, and to which petitioner made substantial contribution.

13. In addition, the items of property found on the annexed schedule (attached hereto as Exhibit "E") are subject to equitable distribution. The approximate value of each item has been provided for the court's information.

14. Upon information and belief, respondent also maintains a law practice. Respondent is a sole practitioner, and petitioner has contributed to the establishment of his practice.

15. Other assets may also be subject to equitable distribution, and petitioner will need the opportunity to engage in discovery to determine the existence and extent of such additional assets.

16. No prior application for the relief requested herein has been made.

WHEREFORE, petitioner respectfully requests that this Court:

A. Schedule a pretrial conference in this matter;

B. Issue a scheduling order at that time requiring the parties to exchange pertinent financial information, including sworn statements of net worth, tax returns, bank statements, pension and IRA information, cancelled checks, and other relevant financial information, and following the exchange of such information, allow for the parties' depositions to be taken within a prescribed time period; and

C. Following discovery, set this matter down for trial on the issue of equitable distribution.

DATED: February 15, 1994
Rochester, New York

Yours, etc.

Harris Beach & Wilcox
David C. Boysen, Esq.,
of Counsel
Attorneys for Petitioner

ANSWER

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ANNA MARIE NICIT,

Petitioner,

-vs- ANSWER

JOHN J. NICIT,

Respondent.

Respondent, answering the Petition:

1. Denies Par. 5, 10, 11, 12, 13 and 14 (last line).

FOR AN AFFIRMATIVE DEFENSE:

2. The Alabama decree is jurisdictionally defective and void.

FOR A SECOND AFFIRMATIVE DEFENSE:

3. The Courts of New York have held in two separate divorce actions that petitioner is not entitled to Equitable Distribution.

4. This proceeding is therefore barred by res judicata.

FOR A THIRD AFFIRMATIVE DEFENSE:

5. DRL 236B is unconstitutional and unenforcible insofar as it purports to provide for Equitable Distribution herein where the Alabama Court did not obtain personal jurisdiction over respondent.

FOR A FOURTH AFFIRMATIVE DEFENSE:

6. New York public policy contemplates and permits judicially imposed Equitable Distribution only where the underlying divorce decree is based upon fault.

7. The Alabama is not such a decree.

WHEREFORE respondent requests an Order requiring petitioner to post security for costs forthwith, and dismissing the Petition with costs.

Dated: April 1, 1994

Yours, etc.
s/ Sam C. Bonney
SAM C. BONNEY
Attorney for Respondent

NOTICE OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ANNA MARIE NICIT, Petitioner, -vs- JOHN J. NICIT, Respondent.	Index No. 27611 NOTICE OF MOTION Assigned Judge: Hon. James R. Harvey

SIRS:

Upon the annexed Affirmation of Sam C. Bonney and Affidavit of John J. Nicit, both dated June 27, and the Deposition of Petitioner [to be handed up], Respondent will move this Court at a Special Term to be held on July 11, 1994 at 9:30 A.M. at Canandaigua, New York, for an Order of Summary Judgment.

Answering Affidavits must be served at least 7 days before the return day.

Dated: June 27, 1994

Yours, etc.
s/ Sam C. Bonney
SAM C. BONNEY,
Attorney for Respondent
Office & P.O. Address
20 W. Main St., P.O. Box 316
Waterloo, New York 13165
Phone: 315-539-9211

TO: Seneca County Supreme Court Clerk
50 Johnston Street
Seneca Falls, New York 13148

Harris Beach & Wilcox
Attorneys for Petitioner
130 E. Main St.
Rochester, N.Y. 14604

SUPPORTING AFFIRMATION

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ANNA MARIE NICIT,
Petitioner

vs.

JOHN J. NICIT,
Respondent.

Index No. 27611
AFFIRMATION
Assigned Judge:
Hon. James R. Harvey

The undersigned, an attorney admitted to practice in the Courts of New York State, affirms the following on penalty of perjury.

1. I am attorney for Respondent and have personal knowledge of the facts herein based upon previous litigation in which I represented Respondent.

2. This proceeding was instituted by service of Show Cause and Petition on March 14, 1994. Answer was served on April 1, 1994. Depositions were taken on June 21. Trial is scheduled for July 11.

3. The Petitioner alleges having obtained an ex parte Alabama divorce decree on November 9, 1993 and now seeks equitable distribution per DRL 236B. The Answer pleads affirmative defenses that said Decree is jurisdictionally void for lack of prerequisite domicile, that 236B is unconstitutional insofar as permits the use of an ex parte foreign decree as a basis for equitable distribution; and that such relief is barred by res judicata.

4. Petitioner departed the marital home in August, 1986 and established a home in Ithaca. An action brought by her in Tompkins County on grounds of cruelty and non-support was non-suited [at the close of her case] in December, 1988. [Decision and Judgment attached as Ex. A]. Another action was brought in Seneca County in August, 1990 on the same grounds, plus hus-

band's alleged refusal to accept an offer to return. Summary judgment of dismissal was affirmed by the Appellate Division on March 13, 1991. [Latter Decision attached as Ex. B].

5. Attached as Ex. C_1-C_3 are relevant papers filed in Alabama action comprising Complaint, Application for default decree/ supporting affidavit of Jerry W. Jackson Esq. and Default Decree.

6. Petitioner's entire deposition is incorporated herein by reference and will be handed up.

WHEREFORE deponent requests an Order granting summary judgment dismissing the Petition, with costs.

Dated: June 27, 1994

s/ Sam C. Bonney

Sam C. Bonney

ALABAMA DIVORCE JUDGMENT ROLL

STATE OF ALABAMA WINSTON COUNTY

ANNA MARIE NICIT,
PLAINTIFF
VS.
JOHN J. NICIT,
DEFENDANT

IN THE CIRCUIT COURT OF WINSTON COUNTY, ALABAMA,
CASE NUMBER: DR-93-2572

COMPLAINT

COMES NOW the Plaintiff, Anna Marie Nicit, and states her claim against the Defendant, John J. Nicit, as follows:

1. That the Plaintiff and the Defendant are both over the age of nineteen (19) years.

2. That the Plaintiff is a bona fide resident citizen of Winston County, Alabama, and has been a resident of the State of Alabama for more than six months next preceding the filing of this Complaint.

3. That the Defendant is a non-resident of the State of Alabama, and whose mailing address is 20 West Main Street, Waterloo, New York 13165.

4. That the Plaintiff and the Defendant were lawfully married to each other on, to wit, the 23rd day of August, 1956, in Seneca County, New York.

5. That the parties separated on, to wit, the 11th day of August, 1986, and since that date have continuously lived in a state of separation.

6. That there are no minor children as issue of the marriage of the parties.

7. That the Plaintiff formerly resided in the State of New York and has initiated a spousal support complaint against the Defendant, and the Defendant is under an order to pay spousal support to the Plaintiff in the amount of $25,000.00 annually.

8. The Plaintiff is entitled to a divorce from the Defendant upon the following statutory grounds:

a) There exists a complete incompatibility of temperaments between the parties such that they can no longer live together as husband and wife.

b) There has been an irretrievable breakdown of the marriage to the extent that any further attempts at reconciliation would be futile and not in the best interest of the parties.

c) The Defendant is guilty of adultery committed after the marriage between the parties.

d) The Defendant has committed actual violence on the person of the Plaintiff intended with danger to the Plaintiff's life or health.

9. The Plaintiff further avers that the parties to this action do not own any property jointly in the State of Alabama.

WHEREFORE, Plaintiff prays for the following relief separately and severally in this cause:

A. That a Summons to which is attached a copy of the Complaint be served forthwith by this Court upon the Defendant, by certified mail, restricted delivery, return receipt requested, at his address, 20 West Main Street, Waterloo, New York, requiring

him to plead or answer to this Complaint within the time allowed by law and the rules of this Honorable Court.

B. That upon a final hearing in this cause, Your Honor will cause to issue out of this Court, a divorce, forever dissolving the bonds of matrimony now existing between the Plaintiff and the Defendant.

C. That the Plaintiff be awarded such other relief as she may be entitled to under the pleading and proof in this cause.

s/ Jerry W. Jackson

JERRY W. JACKSON
ATTORNEY FOR PLAINTIFF
JACKSON & COOK
P.O. BOX 819
HALEYVILLE, ALABAMA 35565

Address of Plaintiff:

1855 Dogwood Lane HC 65
Houston, Alabama 35572

Address of Defendant:

20 West Main Street
Waterloo, New York 13165

Filed
Apr 2 1993
JOYCE MARTIN, REGISTER
CIRCUIT COURT
Winston County, Alabama

STATE OF ALABAMA WINSTON COUNTY

ANNA MARIE NICIT, PLAINTIFF	IN THE WINSTON COUNTY CIRCUIT COURT. CIVIL ACTION NUMBER: DR-93-2572
VS.	
JOHN J. NICIT, DEFENDANT	

APPLICATION TO REGISTER FOR ENTRY OF DEFAULT AND SUPPORTING AFFIDAVIT

The Register is requested to enter a default against the defendant, John J. Nicit, in the above entitled action for failure to plead, answer or otherwise defend as set out in the Affidavit hereto annexed.

s/ Jerry W. Jackson

JERRY W. JACKSON
JACKSON & COOK
ATTORNEY FOR PLAINTIFF
P.O. BOX 819
HALEYVILLE, ALABAMA 35565

FILED
AUG 02 1993
JOYCE MARTIN, Register
CIRCUIT COURT
Winston County, Alabama

STATE OF ALABAMA)
WINSTON COUNTY)

Jerry W. Jackson, being duly sworn deposes and says:

1. That he is attorney of record for the plaintiff and has personal knowledge of the facts set forth in this affidavit.

2. That a Complaint For Divorce was filed in the Winston County Circuit Court by the plaintiff on the 23rd day of April, 1993. That the defendant was served with a copy of the Summons and Complaint by Certified Mail on the 11th day of June, 1993.

3. That more than thirty (30) days have elapsed since the date of service on the defendant.

4. That the defendant has failed to answer or otherwise defend as to the plaintiff's complaint, or to serve a copy of any answer or other defense which he might have upon the undersigned attorney of record for the plaintiff.

5. That the defendant is not an infant or an unrepresented incompetent person.

6. That this affidavit is executed by the affiant herein in accordance with Rule 55 (a) of the Alabama Rules of Civil Procedure for the purpose of enabling the plaintiff to obtain an entry of default against the defendant, for his failure to answer or otherwise defend as to the plaintiff's complaint.

s/Jerry W. Jackson

Affiant- Jerry W. Jackson

Sworn to and subscribed before me on this the 23rd day of July, 1993.

s/Flo Rogers

Notary Public

Default entered against Plaintiff this the 2nd day of August, 1993.

s/Joyce Martin

Register

ALABAMA DECREE

ANNA MARIE NICIT, PLAINTIFF VS. JOHN J. NICIT, DEFENDANT	IN THE CIRCUIT COURT OF WINSTON COUNTY, ALABAMA CIVIL ACTION NUMBER: DR-93-2572

DEFAULT DECREE OF DIVORCE

This action came on Motion of the Plaintiff for a Default Judgment pursuant to Rule 55(b)(2) of the *Alabama Rules of Civil Procedure*, and the Defendant having been duly served with a Summons and Complaint and not being an infant or an unrepresented incompetent person and having failed to plead or otherwise defend, and his default having been duly entered, the Defendant having taken no proceeding since such default was entered, and upon the Affidavit of the Plaintiff.

It is therefore, **ORDERED, ADJUDGED AND DECREED** by the Court as follows:

1. That the bonds of matrimony heretofore existing between the Plaintiff and the Defendant are dissolved, and the Plaintiff is forever divorced from the Defendant on the grounds as set forth in the Complaint.

2. That neither party shall remarry except to each other within sixty days of the date of this decree, and in the event an appeal is taken from said decree then neither party shall again remarry except to each other during the pendence of said appeal.

3. That the terms and conditions of any previous order of separate maintenance, entered by any Court of the State of New York, are incorporated by reference in this decree, and in no way shall supersede any provisions of said support decree.

4. That the costs of this cause having heretofore been paid, then no execution shall be issued.

DONE AND ORDERED this the 9th day of Nov., 1993.

s/Ann R. Richardson

JUDGE

STATE OF ALABAMA)
WINSTON COUNTY)

The undersigned Register of the Circuit Court of Winston County, Alabama, does hereby certify that the foregoing is a true copy of the original decree of divorce granted by said Court in the above-stated cause, as the same appears on record and on file in my office in Double Springs, Alabama.

Witness my hand and the Seal of the Circuit Court of Winston County, Alabama, this 9th day of Nov., 1993.

s/ Joyce Martin

Joyce Martin, Register

FILED
NOV 09 1993
JOYCE MARTIN, Register
CIRCUIT COURT
Winston County, Alabama

SPECIAL TERM DECISION DENYING
SUMMARY JUDGMENT

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ANNA MARIE NICIT, Index No. 27611

Petitioner, DECISION

vs.

JOHN J. NICIT,

Respondent.

Petitioner obtained a default Decree of Divorce from the Circuit Court of Winston County Alabama on November 9, 1993. Petitioner then sought a scheduling order from the Seneca County Supreme Court setting a trial date for equitable distribution of the parties' marital property pursuant to Domestic Relations Law §236(b)(5)(6). Respondent now moves pursuant to notice of motion dated June 27, 1994 for an Order granting him summary judgment dismissing the petition with costs on the basis that Alabama lacked jurisdiction to grant the underlying divorce decree.

At examination before trial several documents were marked for the purpose of substantiating petitioner's claim of intent to establish a domicile in Alabama. These included her surrender of her New York operator's license, her Alabama operator's license and registration, her Alabama voter's registration, two deeds to Alabama land and an Alabama income tax return. Respondent asserts that these indices are insufficient to establish that the petitioner was a bona fide resident of the State of Alabama for six months prior to obtaining the judgment pursuant to Section 30-2-5 of the Code of Alabama 1975.

Whether a divorce decree in a proceeding in which the non-resident defendant did not appear is entitled to full faith and credit depends upon whether the plaintiff was domiciled in the state granting the divorce. Where neither party was domiciled in the state granting the divorce at the time the suit was instituted, the Decree of Divorce is not entitled to full faith and credit in this state. ***Williams v. North Carolina***, 325 US226 (1945), ***Olmstead v. Olmstead***, 190 NY458 (1908). Further, the mere fact that the court granting the divorce found that it had power to award the judgment does not foreclose re-examination by this court. A heavy burden of proof is imposed on the challenger however to establish the lack of domicile and the divorce forum is presumed to have jurisdiction. Upon a finding in this state in accordance with the foreign divorce forum's finding of existence of bona fide domicile this state is bound to give full faith and credit to the foreign divorce at least insofar as it dissolves the marital status. (1 Foster and Freed Law and the Family §9:10).

In this case although it is clear that the petitioner travels extensively in her recreational vehicle and maintains ties with friends, family and church in New York, her acts indicate a settled intent to permanently sever her connections with New York and to permanently make Alabama her home. Since Alabama was the domicile of the petitioner and had been for a period of six months prior to her obtaining a default Divorce Decree. The Alabama court had jurisdiction to render the Divorce Decree and that Decree is entitled to full faith and credit by this Court.

This constitutes the Decision of the Court.

ENTER

s/ James R. Harvey

JAMES R. HARVEY
Acting Supreme Court Justice

Dated this 11th day of July,
1994 at Canandaigua, New York

APPELLATE DIVISION AFFIRMANCE

1793. (Seneca Co.) — ANNA MARIE NICIT, RESPONDENT, V JOHN J. NICIT, APPELLANT. — Order unanimously affirmed with costs. Memorandum: Supreme Court properly denied respondent's motion for summary judgment dismissing the petition. The record supports the court's determination that petitioner had acquired a bona fide domicile in Alabama at the time the divorce action in that State was commenced (*see, Wilke v Wilke,* 73 AD2d 915; *cf. Manasseri v Manasseri,* 121 AD2d 697). The evidence submitted by respondent is insufficient to support his allegation of lack of domicile (*see,* 48 NY Jur 2d, Domestic Relations, § 1474, at 415). The instant proceeding is not barred by res judicata (*see, Nikrooz v Nikrooz,* 167 AD2d 334, 335; 48 NY Jur 2d, Domestic Relations, § 1465, at 399). We reject respondent's contention that petitioner is precluded from maintaining this proceeding on the ground that she obtained the foreign divorce judgment (*see,* Domestic Relations Law § 236 [B] [2] [5]; *Mattwell v Mattwell,* 194 AD2d 715). (Appeal from Order of Supreme Court, Seneca County, Harvey, J. — Equitable Distribution.) PRESENT: DENMAN, P.J., GREEN, BALIO, CALLAHAN, BOEHM, JJ. (Filed Dec. 23, 1994.)

[Reported in 210 A.D.2d 987]

FINDINGS EXCERPTS

16. Petitioner listed for sale with a real estate agent her two parcels of property on Irish Hill Road in Tompkins County New York in September of 1992 (Exhibits 19 and 20), closed out her bank accounts and left for the State of Alabama in late September of 1992 and arriving at the Houston, Alabama area on or about October 5, 1992.

17. Petitioner looked for land in Alabama to purchase and, on October 19, 1992, did purchase lots #22 and #23 in the Dogwood Lane subdivision in Haleyville, Winston County, Alabama (Exhibit 26).

18. During October 1992 the petitioner expended $3,014.69 to improve the lot on Dogwood Lane, becoming part of the electric cooperative, having her phone installed and otherwise making the property at Dogwood Lane her permanent place of residence (Exhibit 30).

19. Petitioner registered to vote in Winston County, Alabama on October 14, 1992 (Exhibit 31), obtained an Alabama drivers license (Exhibit 45) and paid 1992 Alabama Income Tax for the portion of the year that she was a resident of Alabama (Exhibit 28). Petitioner voted in the presidential election in 1992 from Winston County, Alabama and also opened a bank account in Alabama in October of 1992.

41. The petitioner was granted a divorce by a competent court in the State of Alabama which had personal jurisdiction over her and in rem jurisdiction over the marriage (Exhibit 24). The respondent was given due process rights with regard to that proceeding and the proceeding of the courts of the State of Alabama will be given full faith and credit under the constitution of the

United States.

CONCLUSIONS OF LAW EXCERPT

2. The Alabama Divorce Decree obtained by the petitioner from the respondent is entitled to full faith and credit.

EXCERPTS FROM JUDGMENT

At a Trial Term of the Supreme Court held in Canandaigua, New York, on the 5th day of December, 1994.

DEC 12 3 03 PM '94
SENECA COUNTY
CLERK'S OFFICE

PRESENT: HONORABLE JAMES R. HARVEY
Acting Justice of Supreme Court

STATE OF NEW YORK
COUNTY OF SENECA SUPREME COURT

ANNA MARIE NICIT,

Petitioner, JUDGMENT

-vs-

Index No. 27611

JOHN J. NICIT,

Respondent.

Petitioner having brought this application by service of an Order to Show Cause and Petition for equitable distribution following a foreign divorce on or about March 19, 1994 by personal service of said papers on the defendant who duly answered in this proceeding and fully participated in all aspects thereof, and the issues having been tried before the Court on July 11, 12, 13 and August 9 and 12 and the parties having submitted their proposed findings of fact and conclusions of law and trial briefs and this Court having made the findings of fact and conclusions of law dated October 28, 1994, and the Court having held a hearing on

this issue of the amount of counsel fees to be paid by the respondent on November 18, 1994;

NOW, UPON motion of Harris Beach & Wilcox, David C. Boysen, Esq., of counsel, it is

ORDERED, ADJUDGED AND DECREED, that the Decree of Divorce granted by the Circuit Court of Winston County, Alabama, Civil Action Number 9R-93-2572 on or about November 9, 1993 is granted full faith and credit by this Court under the Constitution of the United States; and it is further

DECISION OF AFFIRMANCE BY APPELLATE DIVISION

0987. (Seneca Co.) — MATTER OF ANNA MARIE NICIT, RESPONDENT, V JOHN J. NICIT, APPELLANT. — Judgment unanimously affirmed with costs. Memorandum: In this proceeding to obtain a distribution of marital property following a foreign divorce judgment, Supreme Court properly determined that the appropriate date for the valuation of marital property was the commencement date of the instant proceeding rather than the commencement date of the prior unsuccessful divorce action (*see, Sullivan v Sullivan,* 201 AD2d 417; *see also, Marcus v Marcus,* 135 AD2d 216, 220-221; Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C236B:4, at 197). In view of the factors set forth in Domestic Relations Law § 236 (B) (5) (d), the equal division of marital property was not inequitable or an abuse of discretion (*see, Urtis v Urtis,* 181 AD2d 1001). The record supports the court's determination that respondent's transfer of over $117,000 to the parties' daughter constituted a wasteful dissipation of marital assets (*see,* Domestic Relations Law § 236 [B] [5] [d] [11]). We reject respondent's contentions that the award of counsel fees was not authorized pursuant to Domestic Relations Law § 237 (*see, Mattwell v Mattwell,* 194 AD2d 715, 717) and that the award constituted an abuse of discretion (*see, DeCabrera v Cabrera-Rosete,* 70 NY2d 879, 881). (Appeal from Judgment of Supreme Court, Seneca County, Harvey, J. — Equitable Distribution.) PRESENT: GREEN, J.P., LAWTON, WESLEY, DOERR, DAVID, JJ. (Filed July 14, 1995.)

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

ANNA MARIE NICIT,

Petitioner

-vs-

JOHN J. NICIT,

Respondent.

Index No. 27611

NOTICE OF APPEAL

SIRS:

Respondent hereby appeals to the Court of Appeals from an Order of the Appellate Division entered July 14, 1995 and will also bring up for review the Order of that Court entered December 23, 1994 [CPLR 5501(a)(1)]. [The constitutional questions decided by the latter Order were a necessary predicate of the Order of July 14, 1995 hence were "directly involved" therein [CPLR 5601(b)(1)].

The grounds hereof are errors of law and abuse of discretion as a matter of law.

Dated: July 25, 1995

Yours, etc.
s/ Sam C. Bonney
SAM C. BONNEY
Attorney for Respondent
Office & P. O. Address
20 W. Main St., P. O. Box 316
Waterloo, New York 13165
Phone: 315-539-9211

TO: SENECA COUNTY CLERK
CLERK OF THE APPELLATE DIVISION
CLERK OF THE COURT OF APPEALS
HARRIS, BEACH & WILCOX
Attorneys for Petitioner

State of New York,
Court of Appeals

NOV 07 1995

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second day of November 1995

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

4-10 Mo. No. 1138
In the Matter of Anna Marie Nicit,

Respondent,

v.

John J. Nicit,

Appellant.

The appellant having filed notice of appeal and a motion for leave to appeal to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

SEAL: State of New York
Court of Appeals